90-799

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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November 1990

QUESTION PRESENTED

Whether a brief filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), constitutes a denial of due process since this practice operates to effectively redefine and abrogate the attorney-client relationship.

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No.

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UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Charles Houston, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on August 23, 1990.

OPINIONS BELOW

The United States Air Force Court of Military Review issued an unreported decision on March 9, 1989 (Appendix A). This same court issued a subsequent decision on May 10, 1990 (Appendix B). The second decision was issued in response to a remand from the United States Court of Military Appeals. The order for the remand is reported at 30 M.J. 21 (C.M.A. 1990) (Appendix C). On August 23, 1990 the United States Court of Military Appeals issued a short form decision that is reported at ____ M.J. ____ (C.M.A. 1990) (Appendix D).

JURISDICTION

The fina. rder of the United States Court of Military Appeals was entered on August 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp 1989) and 10 U.S.C. § 867(h) (Supp. 1989).

STATEMENT OF THE CASE

The petitioner, an Air Force master sergeant (E-7), was tried by a general court-martial on August 19, 1988, at Spangdahlem Air Base, Germany. Pursuant to his pleas, he was convicted of multiple sexual offenses against his teenage daughter. The petitioner was sentenced to a dishonorable discharge, confinement for 13½ years, and a reduction to airman basic (E-1).

After trial the petitioner exercised his statutory right to appellate review and appellate representation. Thereafter, appellate defense counsel was appointed, and filed a brief with the United States Air Force Court of Military Review. Appellate defense counsel asserted that the petitioner was sentenced on the basis of erroneous information concerning the length of his military service. The United States Air Force Court of Military Review affirmed the petitioner's case.

The petitioner subsequently petitioned the United States Court of Military Appeals. This time appellate defense counsel filed a "*Grostefon* brief." [1] This brief was based upon three new errors that were personally assigned by the petitioner. The petitioner asserted these errors in an affidavit that accompanied appellate defense counsel's brief. Appellate defense counsel briefed these issues by way of summarizing the petitioner's assignment of errors. Pursuant to a Government motion, the petitioner's case was remanded to the United States Air Force Court of Military Review. Once again, the petitioner's case was affirmed.

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[1] *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Appellant defense counsel subsequently filed another "*Grostefon* brief" with the United States Court of Military Appeals. Once again, the same format was utilized for raising the petitioner's contentions. The United States Court of Military Appeals affirmed without discussion.

REASONS FOR GRANTING THE WRIT

I

The role of appellate defense counsel and the United States Court of Military Appeals must be analyzed in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A 1982).[2] This decision provides as follows:

> Thus, the proper procedure for appellate defense counsel, after consultation with the accused, is to identify the issue to the appellate court and to supply such briefs and argument as he feels will best advance his client's interest . . . Appellate defense counsel may well wish to restate issues in a manner they believe will be more responsive to the courts before which they practice. However, we do not believe that appellate defense counsel can ignore the issues urged from below without the express consent of the accused, after proper advice.

United States v. Grostefon, 12 M.J. at 435-436.

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[2] The petitioner is not attacking or otherwise challenging appellate defense counsel's competence. Instead, this petition is aimed at the artificial constraints that *Grostefon* imposed upon appellate defense counsel. In this regard, it should be recognized that "[a]ppellate defense counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit." Standard 4-8.3, Rules of Professional Responsibility and Air Force Standards for the Administration of Criminal Justice (1989). Interestingly, the accompanying discussion cites *United States v. Grostefon*, in support of this ethical standard. *See* Discussion to Standard 4-8.3.

The Court of Military Appeals stressed that the "identification of the issue does not necessitate extensive briefing." *Id.* at 437. However, appellate defense counsel is obligated to advance *Grostefon* issues until such time as the accused consents to the withdrawal or abandons the same. *Id.* Finally, *Grostefon* held that "the Court of Military Review will, at a minimum, acknowledge that it has considered those issues enumerated by the accused and its disposition of them." *Id.* at 436.

The *Grostefon* decision was revisited in *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). The Court emphasized that "the purpose of our holding in *Grostefon* was to assure that an accused had the opportunity to bring to the attention of the appellate court any issue he wished to have considered. . . ." *Id.* at 397. The Court reiterated that appellate defense counsel merely had to "identify" issues. *Id.* That is, "if the issue has been identified as possibly meritorious, the Court may require briefs thereon." *Id.*

II

In *Anders v. California*, 386 U.S. 738 (1967), this Court addressed appellate counsel's role in relation to frivolous issues. In *Anders* the petitioner was represented by a court-appointed appellate counsel. Counsel determined that there was no merit to the appeal, and as such, he so advised the petitioner and the court. Counsel also advised the petitioner about filing a brief on his own behalf. The court granted counsel's motion to withdraw. When the court refused the petitioner's request for another attorney, the petitioner proceeded on a *pro se* basis. In condemning these procedures this Court noted the following:

> The constitutional requirement of substantial equality and fair process can only be attained where

> counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*.

Id. at 744.

This Court held that counsel should either "support his client's appeal to the best of his ability" or if he finds the case is "wholly frivolous" he should request permission to withdraw. *Id.* Of course, the request to withdraw must be "accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* Logically, this approach would "induce the court to pursue all the more vigorously its own review because of the ready references . . . to the legal authorities as furnished it by counsel." *Id.* at 745.

In *Penson v. Ohio*, 488 U.S. 75 (1988), a court-appointed appellate counsel made a motion to withdraw because he assessed the petitioner's appeal as meritless. While the state court granted counsel's motion to withdraw, the court refused to appoint new counsel. Instead, the court held that it would conduct its own independent review of the petitioner's record. Ultimately, the court granted the petitioner some relief.

This Court rejected the state's approach being contrary to the *Anders* decision. Namely, counsel's conclusory statements provided an inadequate basis for evaluating counsel's performance and for evaluating the potential appellate issues. Accordingly, this Court held that the petitioner was denied assistance of counsel on his appeal. Moreover, this error was treated as presumptively prejudicial.

III

The instant case engenders the same vexing concerns that were expressed in *Anders* and *Penson*. That is, *Grostefon*, as applied, amounts to nothing more than

pro se advocacy. First, appellate defense counsel is only obligated to "identify" issues. *United States v. Healy*, 26 M.J. at 397. Obviously, this is not consistent with notions of forceful advocacy. Moreover, this practice does nothing to advance the cause of marshalling arguments on a client's behalf. *Anders v. California*, 386 U.S. at 741. Interestingly, no offsetting restrictions are placed on the Government's response. In the instant case, the Government torpedoed the petitioner's "*Grostefon* brief" with an authoritative reply. *See* Gov't Brief of April 23, 1990.

Second, *Grostefon* charges the client with the responsibility of identifying his own issues. *United States v. Healy*, 26 M.J. at 397. Consequently, this practice ignores the reality that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Yet, this is the very lay analysis upon which *Grostefon* rests.

Finally, the Court of Military Appeals is not even obligated to conduct its own searching review of the record. Instead, this responsibility has been shifted to the various Courts of Military Review. *United States v. Grostefon*, 12 M.J. at 436. Obviously, this approach is inapposite with the "full examination" that is contemplated by this Court. *Anders v. California*, 386 U.S. at 744.

CONCLUSION

This case warrants Supreme Court intervention. That is, the *Grostefon* practice, as crafted by the nation's highest military court, amounts to a systematic denial of due process. By redefining the role of the attorney-client relationship, *Grostefon* effectively left this petitioner to shift for himself. In the final analysis, *Grostefon* amounts to nothing more than *pro se* advocacy under the guise of appellate representation. Surely, such a practice is at sharp

odds with our treasured notions of American due process. Therefore, his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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November 1990

APPENDICES

APPENDIX A

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 27357

UNITED STATES

v.

MASTER SERGEANT CHARLES HOUSTON, FR 346-42-2592
UNITED STATES AIR FORCE

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9 MARCH 1989

Sentence adjudged 19 August 1988 by GCM convened at Spangdahlem Air Base, Federal Republic of Germany. Military Judge: Edward M. Starr (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for one hundred sixty-two (162) months and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Darla G. Orndorff. Appellate Counsel for the United States: Colonel Joe R. Lamport; Lieutenant Colonel Robert E. Giovagnoni; Major Kathryn I. Taylor; Major Terry M. Petrie and Major Mark C. Ramsey, USAFR.

Before

HODGSON, HOLTE and PRATT
Appellate Military Judges

DECISION

PER CURIAM:

The appellant pleaded guilty to repeatedly sexually abusing his daughter over a period of several years. His acts of rape, anal sodomy, carnal knowledge, and indecent acts began when she was 13 years old and continued until she was almost 17.

During the sentencing portion of the proceedings the assistant trial counsel incorrectly informed the trial judge, who was sitting alone, that the appellant had 17 years, three months and three days of active military service. The truth being that the appellant had over 20 years of active duty.

Appellate defense counsel suggest that "the twenty year mark is a significant anniversary in the military for years of service [as] it marks the time when a member becomes eligible to retire." They argue that this misstatement as to the appellant's length of service may have mislead [sic] the military judge to adjudge a more severe sentence than he would have otherwise done.

In our view counsel's misstatement as to the appellant's time in the military had no impact whatever [sic] on the announced sentence for two reasons: First, the trial judge had considerable evidence before him that the appellant was retirement eligible—the Stipulation of Fact outlining the circumstances of the offenses stated in the opening paragraph that the appellant had been on active duty since 14 February 1968. The appellant, in his unsworn statement, twice informed the judge he had over 20 years service. Finally, in his closing argument, the trial defense counsel reminded the judge that the appellant had been in the Air Force "for more than 20 years;" and, Second, the sentence is entirely appropriate for the appellant's offenses

regardless of his length of service. The findings of guilty and the sentence are

AFFIRMED.

OFFICIAL:
/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 27357 (f rev)

UNITED STATES

v.

MASTER SERGEANT CHARLES HOUSTON, FR 346-42-2592
UNITED STATES AIR FORCE

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10 MAY 1990

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Approved Sentence: Dishonorable discharge, confinement for one hundred sixty-two (162) months and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Darla G. Orndorff. Appellate Counsel for the United States: Colonel Joe R. Lamport; Colonel Robert E. Giovagnoni; Major Kathryn I. Taylor; Major Terry M. Petrie; Major Paul H. Blackwell, Jr.; Captain Leonard R. Rippey and Major Mark C. Ramsey, USAFR.

Before

HODGSON, SPILLMAN and PRATT
Appellate Military Judges

DECISION UPON FURTHER REVIEW

PER CURIAM:

On 9 March 1989, we affirmed the appellants's guilty plea conviction for rape, anal sodomy, carnal knowledge, and indecent acts with his teenage daughter. These offenses took place over approximately three years. We also affirmed a sentence that included a dishonorable discharge, 13 years and six months confinement, and reduction to airman basic.

On 8 January 1990, the Court of Military Appeals remanded the appellant's record of trial to this Court for further review based upon his *Grostefon** submission that his appointed defense counsel only "half-heartedly represent[ed]" him and were lacking in "basic ethics and competence." *United States v. Houston*, 30 M.J. 21 (C.M.A. 1990). In the same document, he claims that the government was guilty of "gross negligence" in 1972, when it erroneously certified him to be medically qualified for Air Traffic Controller duties even though he had an "abnormal heart condition." He also asserts that in 1980, the Air Force caused his wife to undergo two painful and unnecessary back operations. Additionally, he maintains he was given incorrect advice in 1972, which cost him over $18,000.00 in a re-enlistment bonus over the next 12 years. Finally, he urges that his "daughter was misued by the government" prior to trial and her "emotional, psychological, medical and security needs [during this period] were neglected." In summary, the appellant contends that his incestuous relationship with his daughter was the result of stress brought about by the government's "gross negligence" in assigning him Air Traffic Controller duties, making his wife submit to two unnecessary opera-

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* *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

tions, and creating a financial hardship by giving him improper advice about his re-enlistment bonus.

We have said it before, but it bears repeating—individuals convicted of crimes tend to blame their lawyers and others for their misfortune. The law presumes that counsel are effective and act in their client's best interests. Accordingly, the burden of establishing otherwise is placed on the person who claims he was not properly defended. To rebut this presumption, an individual who maintains he was not adequately represented must identify specific conduct which was unreasonable under acceptable professional standards. *United States v. Washington*, 29 M.J. 536 (A.F.C.M.R. 1989); *pet. denied*, 30 M.J. 38 (C.M.A. 1990).

The appellant has assigned a litany of complaints against his assigned counsel which we have examined in conjuction with an affidavit from his trial defense counsel. We consider the appellant's assertions of ineffective assistance of counsel to be devoid of merit and totally unfounded.

One of the appellant's claims was that his counsel were "timid" and "didn't want to make the government angry." Trial defense counsel agreed that he did not want to "throw stones" as there was no reason "to pick a fight" with the prosecution since it had the "[appellant's] confession, a willing witness, and medical evidence to support their case." By reasonable discussions with the government, the defense was able to get four specifications dismissed.

In sum, we conclude that the appellant's counsel acted in a professional and effective manner which provided the

appellant vigorous representation. Upon further review, the findings of guilty and the sentence are again

AFFIRMED

OFFICIAL:
/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

No. 63512/AF
CMR 27357

UNITED STATES

v.

CHARLES HOUSTON

PETITIONS FOR GRANT OF REVIEW – OTHER SUMMARY DISPOSITION

On consideration of appellant's motion to file affidavit and appellee's motion to remand case to the United States Air Force Court of Military Review, it is ordered that said motions are hereby granted; that the decision of the United States Air Force Court of Military Review is set aside; and that the record of trial is returned to the Judge Advocate General of the Air Force for remand to that court for further review.

APPENDIX D

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 63512/AF
CMR Dkt. No. 27357

UNITED STATES, APPELLEE

v.

CHARLES HOUSTON, (346-42-2592), APPELLANT

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review on remand, we conclude that the action taken by that court was adequate as a matter of law. Accordingly, it is, by the Court, this 23rd day of August, 1990

ORDERED:

That said petition is granted; and

That the decision of the United States Air Force Court of Military Review on remand is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (ORNDORFF)
Appellate Government Counsel (BLACKWELL)

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